

ILLINOIS REGISTER

DEPARTMENT OF REVENUE

NOTICE OF PROPOSED AMENDMENT

- 1) Heading of the Part: Non-Home Rule Municipal Retailers' Occupation Tax
- 2) Code Citation: 86 Ill. Adm. Code 693
- 3) Section Numbers: 693.115 Proposed Action: Amendment
- 4) Statutory Authority: 65 ILCS 5/8-11-1.3
- 5) A Complete Description of the Subjects and Issues Involved: These proposed regulations provide guidance for retailers to determine what local taxes they incur based on the location where they are "engaged in the business of selling tangible personal property." The Department's current regulation governing local jurisdictional issues was invalidated by the Illinois Supreme Court in *Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130. The proposed rule contains three basic parts. In subsection (a), the rule sets out three core principles underlying determinations for local occupation tax sourcing. As the court in *Hartney* emphasized, a fact-intensive inquiry into the composite of activities that comprise a retailer's business must be analyzed. Subsection (b) applies these principles to commonly occurring types of retail transactions, thereby providing guidance to the vast majority of retailers operating in Illinois. Subsection (c) then applies these principles to retailers that engage in selling activities in multiple jurisdictions. This subsection establishes several primary factors to be used in determining local occupation tax sourcing, as well as several secondary factors to be used when the primary factors, alone, are not dispositive. It also sets out guidance to be used when a determination is very close, due to the fact that a retailer's activities are spread throughout so many jurisdictions. In this case, the rule provides that the Department will evaluate all the factors in keeping with the principle articulated in *Hartney* that a retailer incurs tax in the jurisdiction where it "enjoyed the greater part of governmental protection [and] benefitted by being conducted under that protection." The regulation reiterates *Hartney's* emphasis on the Department's ability to look through the form of a putatively multijurisdictional transaction to its substance in determining where enough of the business of selling takes place to subject it to local occupation taxes.
- 6) Published studies or reports, and sources of underlying data, used to compose this rulemaking: None
- 7) Will this rulemaking replace any emergency rulemaking currently in effect: No
- 8) Does this rulemaking contain an automatic repeal date? No

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- 9) Does this rulemaking contain incorporations by reference? No
- 10) Are there any other proposed rulemakings pending on this Part? No
- 11) Statement of Statewide Policy Objective: This rulemaking does not create a State mandate, nor does it modify any existing State mandates.
- 12) Time, Place and Manner in which interested persons may comment on this proposed rulemaking: Persons who wish to submit comments on this proposed rulemaking may submit them in writing by no later than 45 days after publication of this Notice to:

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- 13) Initial Regulatory Flexibility Analysis:
- A) Types of small businesses, small municipalities and not for profit corporations affected: Retailers; municipalities that receive tax revenue under this Part.
- B) Reporting, bookkeeping or other procedures required for compliance: Bookkeeping.
- C) Types of professional skills necessary for compliance: Bookkeeping.
- 14) Regulatory Agenda on which this rulemaking was summarized: January 2014.

The full text of the Proposed amendment is identical to that of the text of the Emergency amendment for this Part, and begins in this issue of the *Illinois Register* on page _____:

TITLE 86: REVENUE
CHAPTER I: DEPARTMENT OF REVENUE

PART 693
NON-HOME RULE MUNICIPAL RETAILERS' OCCUPATION TAX

Section

- 693.101 Nature of the Non-Home Rule Municipal Retailers' Occupation Tax
- 693.105 Registration and Returns
- 693.110 Claims to Recover Erroneously Paid Tax
- 693.115 Jurisdictional Questions

EMERGENCY

- 693.120 Retailers' Occupation Tax Regulations
- 693.125 Penalties, Interest and Procedures
- 693.130 Ordinance Filing Deadlines; When Tax Rate Change Applies

AUTHORITY: Implementing the Non-Home Rule Municipal Retailers' Occupation Tax Act [65 ILCS 5/8-11-1.3] and authorized by Section 2505-15 of the Civil Administrative Code of Illinois [20 ILCS 2505/2505-15].

SOURCE: Adopted at 24 Ill. Reg. 17831, effective November 28, 2000; amended at 32 Ill. Reg. 2829, effective February 8, 2008, emergency amended at 38 Ill. Reg. _____, effective _____, for a maximum of 150 days.

**Section 693.115 Jurisdictional Questions
EMERGENCY****a) Municipal and Municipality Defined**

When used in this Part, "municipal" and "municipality" mean a city, village, or incorporated town, including an incorporated town that has superseded a civil township.

b) Retailer's Selling Activities Determine Taxing Jurisdiction

- 1) The Non-Home Rule Municipal Retailers' Occupation Tax Act authorizes non-home rule municipalities to impose a tax on those engaged in the business of selling tangible personal property at retail within the municipality. 65 ILCS 5/8-11-1.3. Because the statute imposes a tax on the retail business of selling, and not on specific sales, the jurisdiction in which the sale takes place is not necessarily the jurisdiction where the local retailers' occupation tax is owed. Rather, it is the jurisdiction where the seller is engaged in the business of selling that can impose the tax. *Automatic Voting Machs. v. Daley*, 409 Ill. 438, 447 (1951) ("In short, the tax is imposed on the 'occupation' of the retailer and not upon the 'sales' as such.") (citing *Mahon v. Nudelman*, 377 Ill. 331 (1941) and *Standard Oil Co. v. Dep't of Finance*, 383 Ill. 136 (1943)); see also *Young v. Hulman*, 39 Ill. 2d 219, 225 (1968) ("the retailers occupational tax . . . imposes liability upon the occupation of Selling at retail and not on the Sale itself"). By allowing the municipality to impose tax on retailers who conduct business in the municipality, the Non-Home Rule Municipal Retailers' Occupation Tax Act links the retailer's tax liability to where it principally enjoys the benefits of government services. *Svithiod Singing Club v. McKibbin*, 381 Ill. 194, 199 (1942).
- 2) Illinois Supreme Court – fact-specific inquiry. The Illinois Supreme Court has held that the occupation of selling is comprised of "the composite of many activities extending from the preparation for, and the obtaining of, orders for goods to the final consummation of the sale by the passing of title and payment of the purchase price." *Ex-Cell-O Corp. v. McKibbin*, 383 Ill. 316, 321 (1943). Thus, establishing where "the taxable business of selling is being carried on" requires a fact-specific inquiry into the composite of activities that comprise the retailer's business. *Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130 ¶ 32 (citing *Ex-Cell-O Corp. v. McKibbin*, 383 Ill. 316, 321-22 (1943)).
- 3) Determination of Taxing Jurisdiction. Applying the provisions in subsections (b)(1)-(b)(2) of this Section, a seller incurs Non-Home Rule

Municipal Retailers' Occupation Tax in the municipality if its predominant and most important selling activities take place in the municipality. Isolated or limited business activities within a jurisdiction do not constitute engaging in the business of selling in that jurisdiction when other more significant selling activities occur outside the jurisdiction, and the business predominantly takes advantage of government services provided by other jurisdictions. *Ex-Cell-O Corp. v. McKibbin*, 383 Ill. 316, 322-23 (1943); *Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130 ¶¶ 30-35.

- c) Guidance on the Application of the Composite of Selling Activities Test to Common Selling Operations
- 1) In general. For most retailers, the jurisdiction in which they are engaged in the business of selling is not open to reasonable dispute because it is obvious where the most significant selling activities take place. Retailers engaged in common selling operations, with a clear location of predominant selling activities, constitute the vast majority of retailers in the State. Subsections (c)(2)-(c)(7) of this Section provide guidance on applying the fact-specific “composite of selling activities” test to common and longstanding selling operations.
 - 2) Over-the-counter sales. When a person makes an over-the-counter sale of tangible personal property in a jurisdiction and (a) the purchaser takes possession of the property immediately; or (b) the seller ships the property to the purchaser from the location where the sale was made, then the seller is engaged in the business of selling with respect to that sale in the jurisdiction where the over-the-counter sale occurred.
 - 3) In-state inventory/out-of-state selling activity. If a retailer's selling activity takes place outside this State, but the tangible personal property that is sold is in an inventory of the retailer located within a jurisdiction in Illinois at the time of its sale (or is subsequently produced in the jurisdiction), then delivered in Illinois to the purchaser, the jurisdiction where the property is located at the time of the sale or when it is subsequently produced will determine where the seller is engaged in business with respect to that sale. *Chemed Corp., Inc. v. Department of Revenue*, 186 Ill. App. 3d 402 (4th Dist. 1989).
 - 4) Sales Through Vending Machines. The seller's place of engaging in business when making sales through a vending machine is the place where the vending machine is located when the sales are made.

- 5) Sales From Vehicles Carrying Uncommitted Stock of Goods. The seller's place of engaging in business when making sales and deliveries (not just deliveries pursuant to previously completed sales, but actual sales and deliveries) from a vehicle in which a stock of goods is being carried for sale is the place at which the sales and deliveries happen to be made – the vehicle carrying the stock of goods for sale being regarded as a portable place of business.
- 6) Sales of Coal or Other Minerals. A retail sale by a producer of coal or other mineral mined in Illinois is a sale at retail in the jurisdiction where the coal or other mineral mined in Illinois is extracted from the earth. For purposes of this Section, "extracted from the earth" means the location at which the coal or other mineral is extracted from the mouth of the mine.
 - A) A retail sale is a sale to a user, such as a railroad, public utility or other industrial company, for use. "Mineral" includes not only coal, but also oil, sand, stone taken from a quarry, gravel and any other thing commonly regarded as a mineral and extracted from the earth.
 - B) A mineral produced in Illinois, but shipped out of Illinois by the seller for use outside Illinois, will generally be tax exempt under the Commerce Clause of the Federal Constitution (i.e., as a sale in interstate commerce). This exemption does not extend, however, to sales to carriers, other than common carriers by rail or motor, for their own use outside Illinois if the purchasing carrier takes delivery of the property in the jurisdiction and transports it over its own line to an out-of-State destination.
 - C) A sale by a mineral producer to a wholesaler or retailer for resale would not be a retail sale by the producer and so would not be taxable. The taxable sale (the retail sale) is the final sale to the user, and the local retailers' occupation tax on that sale will go to the jurisdiction where the retailer is engaged in the business of selling as provided in this Section.
- 7) Order Acceptance Not Doing Business in the Municipality
 - A) Except as otherwise provided in subsections (c)(2)-(c)(6), acceptance of purchase orders for the sale of tangible personal property in a jurisdiction does not constitute engaging in the business of selling in the jurisdiction in which orders are accepted if the following conditions are met: (i) the seller has no other selling activity in the jurisdiction except receipt and acceptance of

purchase orders; (ii) all orders for the purchase of tangible personal property are submitted to the seller in the jurisdiction by means of telephone or Internet; and (iii) the seller's employees or agents who accept purchase orders record information relayed by the customer (such as purchaser's name and address; price, type and quantity of items; and method of payment and delivery), but do not negotiate or exercise discretion on behalf of the seller.

- B) The place of engaging in the business of selling for retailers who accept purchase orders in a jurisdiction and who meet the criteria set forth in subsection (c)(7)(A) shall be determined based on the composite of selling activities engaged in outside the jurisdiction in which purchase orders are accepted, in accordance with subsections (d)(2)-(d)(4).

d) Application of Composite of Selling Activities Test to Multi-Jurisdictional Intrastate Retailers

- 1) In General. Some sellers are engaged in retail operations with selling activities in multiple jurisdictions in Illinois that do not fall within any of the categories identified in subsection (c) of this regulation. The selling activities that comprise these businesses "are as varied as the methods which men select to carry on retail businesses." *Ex-Cell-O Corp. v. McKibbin*, 383 Ill. 316, 321 (1943). Consequently, "it is . . . not possible to prescribe by definition which of the many activities must take place in [a jurisdiction] to constitute it an occupation conducted in [that jurisdiction]. . . . [I]t is necessary to determine each case according to the facts which reveal the method by which the business was conducted." *Ex-Cell-O Corp. v. McKibbin*, 383 Ill. 316, 321-22 (1943); see also *Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130 ¶ 36. The location of the selling activities most important to each retailer's business of selling dictates the jurisdiction where it is engaged in the business of selling.
- 2) Primary Factors. Without attempting to anticipate every kind of fact situation that may arise, taxpayers that divide selling activities among personnel located in multiple jurisdictions should consider the following selling activities to determine where they are engaged in the business of selling and, therefore, the correct taxing jurisdiction:
 - A) Location of officers, executives and employees with discretion to negotiate on behalf of, and to bind, the seller, *Automatic Voting Machs. v. Daley*, 409 Ill. 438, 440 (1951); *Marshall & Huschart Mach. Co. v. Dep't of Revenue*, 18 Ill. 2d 496, 501 (1960); *Int'l-*

- Stanley Corp. v. Dep't of Revenue, 40 Ill. App. 3d 397, 406 (1st Dist. 1976); Hartney Fuel Oil Co. v. Hamer, 2013 IL 115130 ¶ 62;
- B) Location where offers are prepared and made, Automatic Voting Machs. v. Daley, 409 Ill. 438, 441, 452 (1951);
 - C) Location where purchase orders are accepted or other contracting actions that bind the seller to the sale are completed, Ex-Cell-O Corp. v. McKibbin, 383 Ill. 316 (1943); Automatic Voting Machs. v. Daley, 409 Ill. 438, 452 (1951); and
 - D) Location of inventory if tangible personal property that is sold is in the retailer's inventory at the time of its sale or delivery, Int'l-Stanley Corp. v. Dep't of Revenue, 40 Ill. App. 3d 397, 401, 406 (1st Dist. 1976); Chemed Corp., Inc. v. State, 186 Ill. App. 3d 402, 421-22 (4th Dist. 1989).
- 3) Secondary Factors. If, after consideration of the factors listed in subsection (d)(2) of this Section, the jurisdiction in which the seller is engaged in the business of selling is unclear, the following additional factors should be considered to resolve the issue:
- A) Location where marketing and solicitation occur, Hartney Fuel Oil Co. v. Hamer, 2013 IL 115130 ¶ 62;
 - B) Location where purchase orders or other contractual documents are received when purchase orders are accepted, processed, or fulfilled in a location or locations different from where they are received;
 - C) Location of the delivery of the property to the purchaser, Ex-Cell-O Corp. v. McKibbin, 383 Ill. 316, 323 (1943);
 - D) Location where title passes, Int'l-Stanley Corp. v. Dep't of Revenue, 40 Ill. App. 3d 397, 406 (1st Dist. 1976); and
 - E) Location of the retailer's ordering, billing, accounts receivable and other administrative functions, Federal Bryant Mach. Co. v. Dep't of Revenue, 41 Ill. 2d 64, 68 (1968); Automatic Voting Machs. v. Daley, 409 Ill. 438, 452 (1951); Hartney Fuel Oil Co. v. Hamer, 2013 IL 115130 ¶ 62.
- 4) Principles Underlying Determination of Seller's Location
- A) When a retailer's selling activities are spread through multiple Illinois jurisdictions, and where the retailer is engaged in the

business of selling presents a close question, the Department will evaluate the factors in subsections (d)(2) and (d)(3) of this Section in keeping with the principle that the retailer incurs local retailers' occupation tax in the jurisdiction where it "enjoyed the greater part of governmental protection [and] benefitted by being conducted under that protection." *Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130 ¶ 34 (quoting *Svithiod Singing Club v. McKibbin*, 381 Ill. 194, 197 (1942)).

- B) The Department "may look through the form of a putatively [multijurisdictional] transaction to its substance" to determine where "enough of the business of selling took place" and, thus, where the seller is subject to local retailers' occupation tax. *Marshall & Huschart Mach. Co. v. Dep't of Revenue*, 18 Ill. 2d 496, 501 (1960); *Fed. Bryant Mach. Co. v. Dep't of Revenue*, 41 Ill. 2d 64, 67 (1968); *Int'l-Stanley Corp. v. Dep't of Revenue*, 40 Ill. App. 3d 397, 406 (1st Dist. 1976); *Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130 ¶ 31. For example, the Department will not look to the location of a party that is owned by or has common ownership with a supplier or a purchaser if that party does not, in substance, conduct the selling activities identified in subsections (d)(2) and (d)(3).

(Source: emergency amended at 38 Ill. Reg. _____, effective _____, for a maximum of 150 days)